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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Rules and Policies on Foreign )  
Participation in the U.S. )  
Telecommunications Market )

IB Docket No. 97-142

To: The Commission )

**REPLY COMMENTS OF**  
**CABLE & WIRELESS, PLC**

Cable & Wireless, plc ("C&W"), by its attorneys, hereby responds to the initial comments filed in response to the Commission's June 4, 1997 Notice of Proposed Rulemaking ("*Notice*") in the proceeding captioned above. As discussed below, no evidence produced in this proceeding supports the imposition of entry restrictions or competitive safeguards on foreign-affiliated U.S. carriers. Rather, it is clear that such restrictions would not be in the public interest because they would frustrate the efforts of these carriers to compete and thus would deny the U.S. public the full benefits of competition.

**I. ACHIEVEMENT OF THE COMMISSION'S GOAL OF EFFECTIVE COMPETITION REQUIRES THAT FOREIGN-AFFILIATED CARRIERS BE ALLOWED TO COMPETE UNIMPEDED IN THE POST-WTO ENVIRONMENT.**

The comments filed in this proceeding express overwhelming support for the World Trade Organization Basic Telecom Agreement ("WTO Agreement") and the principles of open market access and national treatment on which this historic document is based. As most commenters recognized, implementation of the WTO Agreement, *inter alia*, will

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promote the development of effective competition in the U.S. international services market. This in turn will yield substantial benefits for U.S. consumers.<sup>1</sup>

An issue over which there is much debate, however, is whether to eliminate existing Commission rules on foreign carrier entry and participation in the U.S. market. C&W and most other commenters support the Commission's proposal to eliminate the Effective Competitive Opportunities ("ECO") test and other burdensome regulations that prevent foreign-affiliated carriers from competing fully in the U.S. market. Other commenters — those that would benefit from a less competitive environment — argue for retention of these requirements, and support the Commission's proposal to impose new "competitive safeguards" on U.S. carriers affiliated with foreign carriers that have "market power" in the destination market. They do so by raising the most theoretical of concerns about *potential* anticompetitive behavior of foreign-affiliated U.S. carriers. C&W respectfully suggests that good public policy is based on likely events, not mere speculation. Those commenters who propose to restrict the ability of foreign-affiliated carriers to compete have confused their own private interests with the public interest.

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<sup>1</sup> Comments of United States Trade Representative at 2 (consumers will save billions of dollars as competition reduces prices in the U.S. and worldwide); Comments of United States Telephone Association at 2 (WTO Agreement facilitates the participation of its members in markets abroad, thereby affording these companies additional economies and expertise which they can use for the benefits of their customers); Comments of NextWave Personal Communications Inc. at 3 (free flow of capital will accelerate global development of advanced infrastructure).

**A. THERE IS NO EVIDENCE THAT FOREIGN CARRIER ENTRY AND PARTICIPATION IN THE U.S. MARKET HAS OR WILL RESULT IN "COMPETITIVE HARM" THAT SHOULD BE ADDRESSED THROUGH ENTRY RESTRICTIONS OR COMPETITIVE SAFEGUARDS.**

While the fundamental premise for the proposal to impose entry restrictions and competitive safeguards on foreign-affiliated U.S. carriers is based on competitive harm, not one commenter, nor the *Notice*, presents any credible evidence that foreign-affiliated carriers have actually engaged in or are likely to engage in such conduct. In apparent recognition of the absence of any such evidence, a few commenters, most notably AT&T, argue that allowing foreign-affiliated carriers to compete fully in the U.S. is not in the public interest because they *might* use their affiliate's role in the destination market anticompetitively.<sup>2</sup> To address this *potential* for "competitive harm," AT&T and others insist that the FCC must retain the ECO test or adopt other rules and policies that would restrict entry or regulate participation in the market on the basis of reciprocity, market power, compliance with benchmark accounting rates, or some other factor. Indeed, AT&T suggests the FCC go even further and add new requirements to the ECO test<sup>3</sup> and impose new regulatory burdens on foreign-affiliated carriers,<sup>4</sup> all for the sake of "preserving competition." This solution is

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<sup>2</sup> See Comments of AT&T Corp. at 2; Comments of Worldcom at 3-4.

<sup>3</sup> AT&T, for example, would make compliance with the GATS Reference Paper part of the ECO test. Comments of AT&T at 18. While the Reference Paper requires that interconnection be available at "any technically feasible point in the network," the ECO test imposes no such requirement.

<sup>4</sup> AT&T would require public disclosure of all affiliated transactions and the filing of monthly reports showing the prices, terms, and conditions of all products and services provided by the affiliated foreign carrier. Comments of AT&T at 50.

blatantly self-serving. More importantly, its adoption ultimately would undermine the achievement of effective competition in the U.S. market to the detriment of U.S. consumers.

As evidence of the potential "competitive harm" that foreign-affiliated carriers can wreak on the U.S. market, AT&T supplies the affidavit of its economist, William H. Lehr. Mr. Lehr alleges that a foreign carrier that controls a U.S. affiliate can use above-cost settlement rates to lower its affiliate's outbound U.S. prices below cost and effect a "price squeeze." The foreign carrier would benefit under this scenario. It would receive a net gain in revenue because under the assumed facts the additional settlement payments would more than offset the losses caused by predatory rates. Mr. Lehr asserts that since the U.S. market for outbound international services is effectively competitive and rates are at cost, unaffiliated U.S. carriers would be forced to lower their prices and suffer losses at levels that would be "unlikely to be sustainable without severe harm to U.S. industry and to consumers."<sup>5</sup>

The bases for this syllogism are simply assumed — no evidence to support them is given. The unsubstantiated assumptions include, *inter alia*, the existence of above-cost settlement rates, cost-based calling prices, the likelihood of customers to change carriers, high elasticities of demand, and the inability of affected carriers and regulators to prevent or remedy attempts of competitive harm. For example, while Mr. Lehr assumes that all foreign settlement rates are above cost, he cites nothing to support his assumption. Rather, Mr. Lehr simply cites to the Commission's *Benchmark Notice* — which itself relies not on record

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<sup>5</sup> Comments of AT&T, Lehr Affidavit at 16. Mr. Lehr asserts that this scenario is not affected by whether the foreign carriers enter the U.S. market as resellers or facilities-based carriers. *Id.* However, as Mr. Lehr notes, this assumes that there is a sustainable competitive equilibrium in the U.S., and no evidence is provided to support this assumption.

evidence of foreign carrier costs but on AT&T's estimates of its own costs to terminate international traffic in the U.S. <sup>6</sup> Without knowing the extent to which settlement rates are above cost, there is no basis for Mr. Lehr's assertion that foreign carriers are receiving a "multibillion dollar subsidy" that can be used to fund "anticompetitive activities" in the U.S. and elsewhere.<sup>7</sup> Moreover, assuming *arguendo* above-cost settlement rates, the significance of the threat of competitive harm depends totally on which markets have above-cost rates and by how much they exceed costs — something not in the record.

Similarly, Mr. Lehr simply assumes that U.S. outbound calling prices are at cost; no evidence is supplied to support his assumption. Thus, there is nothing to support the corollary that any reduction in price below that charged by an unaffiliated U.S. carrier would be predatory, unsustainable in the long run, and ultimately harmful to U.S. consumers. It is equally plausible to assert that international outbound calling prices exceed cost. It is generally recognized that margins are low on domestic traffic. Furthermore, as reported in the FCC's most recent study of the international market, U.S. retained revenue per minute has increased in recent years.<sup>8</sup> As such, it is just as valid to assert that any reduction in U.S. outbound calling prices would be beneficial for consumers.

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<sup>6</sup> International Settlement Rates, *Notice of Proposed Rulemaking*, IB Docket No. 96-261, FCC 96-484 (Dec. 19, 1996), at ¶¶ 8, 50-51. AT&T's and the Commission's repeated references to each other's "evidence" of above-cost accounting rates cannot substantiate the allegation in any particular market.

<sup>7</sup> However, as accounting rates have declined in recent years, it is fair to assume that to the extent there is a "problem," it is decreasing quickly.

<sup>8</sup> See Trends in the U.S. International Telecommunications Industry, Industry Analysis Division, Common Carrier Bureau, FCC (June 1997).

In the same manner, Mr. Lehr assumes that customers will be quick to change carriers upon learning of reductions in U.S. outbound calling prices, and that these customers will inevitably transfer their requirements for local and domestic long distance services as well as their requirements for international service to the new carrier.<sup>9</sup> Once again, Mr. Lehr supplies no evidence to support this assumption. In making this claim, Mr. Lehr ignores the fact that large users of international service typically purchase service under contract and hence may not be able to change carriers easily regardless of whether the price reduction is substantial. Thus, there is nothing to support Mr. Lehr's assumption that U.S. carriers will suffer a damaging revenue loss from reductions in U.S. outbound calling prices.

Mr. Lehr also fails to supply any basis for his determination of a demand elasticity of .7. This is most surprising as Mr. Lehr's "assumption" of a high demand coefficient is critical to his conclusion that his theoretical "price squeeze" would result in a net gain for the foreign carrier.

Finally, Mr. Lehr assumes that unaffiliated U.S. carriers would be helpless victims of foreign carriers' anticompetitive schemes and would suffer in silence. Nothing could be further from the truth. In making this assumption, Mr. Lehr ignores the fact that implementation of the WTO Agreement will give U.S. carriers the right to enter foreign markets and provide end-to-end service in direct response to the anticompetitive conduct of Mr. Lehr's hypothetical foreign carrier.<sup>10</sup> Furthermore, any attempt by a foreign-affiliated carrier to engage in predatory pricing in the U.S. international services market as suggested

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<sup>9</sup> Comments of AT&T, Lehr Affidavit at 19.

<sup>10</sup> Indeed, AT&T is not as helpless as Mr. Lehr assumes. It has great flexibility to initiate or respond to changes through its WorldPartners consortium in response to any competitive threat.

by Mr. Lehr would be obvious immediately to unaffiliated U.S. carriers on the route in question. Such action would be a "price war" as Mr. Lehr terms it in his Affidavit. Affected carriers obviously would complain to the FCC and to the relevant foreign regulators, who would take appropriate action to address the foreign carrier's anticompetitive conduct and prevent such incidents from occurring in the future. As unaffiliated U.S. carriers would be able to respond effectively to any anticompetitive behavior on the part of foreign carriers, it is hard to give credence to Mr. Lehr's assertion that U.S. industry would suffer "severe harm" as a result of this "price war." It is even harder to assume that any foreign-affiliated carrier would conclude that such behavior would benefit it.

**B. ENTRY RESTRICTIONS AND COMPETITIVE SAFEGUARDS WILL HINDER THE DEVELOPMENT OF COMPETITION IN THE U.S. AND ABROAD, AND WILL PLACE THE U.S. IN VIOLATION OF ITS OBLIGATIONS UNDER GATS.**

In the absence of evidence of a real competitive issue, it will be damaging to the public interest if the Commission imposes entry restrictions and competitive safeguards on foreign-affiliated carriers. Entry restrictions and competitive safeguards will make it more difficult for foreign carriers to compete, and deny the public the full benefit that these carriers can bring to the U.S. market.<sup>11</sup> This is true for a number of reasons. First, the ECO test is burdensome and costly for both carriers and the Commission. In delaying entry, the ECO test gives established carriers additional time to entrench themselves in the market.<sup>12</sup> In addition, compliance with benchmark accounting rates as a condition of entry will effectively swallow the Commission's open entry policy, since very few WTO Member

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<sup>11</sup> Comments of Sprint Communications Co., L.P. at 19.

<sup>12</sup> Comments of FaciliCom International, L.L.C. at 4-5.

countries can meet this standard.<sup>13</sup> Clearly joint marketing restrictions circumscribe a carrier's flexibility with respect to global marketing and will place carriers with foreign affiliates at a distinct competitive disadvantage in addressing the market for multinational companies.<sup>14</sup> Finally, requiring approvals for circuit additions slows a carrier's ability to respond to customer demands and thus ultimately works to the disadvantage of consumers in terms of price and service quality.<sup>15</sup> In combination, these restrictions will seriously undermine the Commission's stated competitive goals in this proceeding. In light of this, the Commission should not simply assume the worst and adopt these measures.

The imposition of entry restrictions and competitive safeguards as proposed by the Commission in the *Notice* and by AT&T and others in their comments will not only be damaging to the public interest, but also will place the U.S. in violation of its GATS obligations regarding market access, most-favored nation, and national treatment.<sup>16</sup> At the very least, imposition of entry restrictions and competitive safeguards in the absence of evidence of harm will send a message to other countries that the U.S. is willing to undercut or ignore its obligations under the WTO Agreement.<sup>17</sup> This could, in turn, prompt foreign governments to erect their own barriers to entry or deny full and effective participation by

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<sup>13</sup> Comments of Telefónica Internacional de España, S.A. at 2. C&W notes that the U.K. government does not require compliance with benchmark accounting rates as a condition of granting an international facilities license, despite the fact that the U.K., like the U.S., is a net outpayer on many routes.

<sup>14</sup> Comments of BT North America Inc. at 4; Comments of GTE Service Corp. at 19.

<sup>15</sup> Comments of GTE at 19.

<sup>16</sup> Comments of GTE at 18-20; Comments of Telefónica Internacional at 2-3, 14-16; Comments of the Government of Japan at 3; Comments of Deutsche Telekom at 23-27.

<sup>17</sup> Comments of MCI Telecommunications Corp. at 6; Comments of Shell Offshore Services Corp. at 6.



U.S. carriers in their markets in order to address the "potential" for "competitive harm."<sup>18</sup>

The end result will be that foreign carriers could lose the ability to participate fully and effectively in U.S. markets, U.S. carriers could lose the ability to participate fully and effectively in foreign markets, and consumers will lose the benefits that full and effective competition can bring.

**C. THE FCC SHOULD ELIMINATE RESTRAINTS ON ENTRY AND ON FOREIGN CARRIER PARTICIPATION IN THE U.S. MARKET AND GIVE COMPETITION A CHANCE TO DEVELOP IN THE POST-WTO ENVIRONMENT.**

C&W submits that in deciding how to modify its program of foreign carrier regulation, the Commission would do well to follow President Roosevelt's advice to "speak softly and carry a big stick." In the absence of real evidence that foreign carrier participation in the U.S. market is a likely source of competitive harm, the FCC should eliminate restraints on entry and on foreign carrier participation in the U.S. market and allow competition to run its course. Regulatory intervention at this time should be limited only to the degree necessary to detect anticompetitive conduct. If the Commission finds evidence of a "price squeeze" or other misconduct, it can at that time seek redress as appropriate under the GATS and the Communications Act, and can implement measures to prevent such conduct from reoccurring.<sup>19</sup> In brief, in the absence of evidence of competitive harm, the Commission should not institute unnecessary and anticompetitive regulations. It should give

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<sup>18</sup> Comments of GTE at 5; Comments of France Telecom at 2, 4-5; Comments of Telefónica Internacional at 2. C&W notes that European Community rules do not permit EU members to deny licenses to carriers possibly considered dominant in other WTO Member Countries, even if these carriers are later found to engage in anticompetitive behavior.

<sup>19</sup> Comments of GTE at 5-6, 12-13; Comments of Nippon Telegraph & Telephone Corp. at 2; Comments of BTNA at 3-4; Comments of FT at 11.

the WTO Agreement a chance to operate and U.S. consumers a chance to reap the benefits that effective competition, made possible by the WTO Agreement, can bring.

## II. CONCLUSION

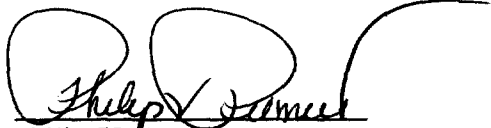
For these reasons, the Commission should eliminate the ECO test and its current regulations that prevent foreign-affiliated carriers from participating fully and effectively in the U.S. international services market. Furthermore, the Commission should refrain from adopting new regulatory requirements that would hinder these carriers in their efforts to compete. As demonstrated herein, such action is necessary to promote competition and hence to ensure achievement of the Commission's goals in this proceeding.

Respectfully submitted,

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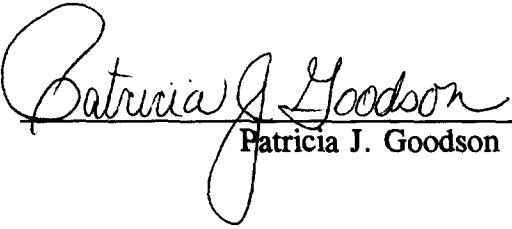
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